

Petitioner-Appellant Wilmoth argues that his §1983 claim could not have been brought until after he brought a state law proceeding for wrongful incarceration. There is no authority for the proposition that a §1983 claim cannot be brought for a wrongful conviction until there is a state-law finding of wrongful incarceration. When we examine the basis for the Supreme Court's holding in *Heck*, i.e., that a conviction must be overturned on appeal in state court or called into question by a federal court's issuance of a writ of habeas corpus, it is clear that a finding of wrongful incarceration is not a prerequisite for filing a §1983 action.

The Court explained:

[The Court's holding] "avoids parallel litigation over the issues of probable cause and guilt ... and it precludes the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." [Citation

omitted.] Furthermore, "to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit." [Citation omitted.] This Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack [Citations omitted.]

Heck, 114 S. Ct at 2371-72.

"Finality" occurred at the latest when charges against Petitioner were dropped. The documents provided by Petitioners with their response brief in the District Court below confirmed that the prosecuting attorney filed a nolle prosequi on October 11, 2000. The nolle prosequi is a "formal entry upon the record ... by the prosecuting attorney in a criminal action, by which he declares that he 'will no further prosecute' the case" Black's Law Dictionary, 6th ed. The District Court correctly held that the statute of limitations began to run no later than upon the filing of the nolle prosequi.

Finally, Petitioners argue that the statute of limitations did not begin until the state court ruled on the application for wrongful imprisonment, one way or the other. There is no authority for this proposition. ¹ It contradicts the express language of *Heck* that a "reversal on direct appeal" is sufficient to begin an action under §1983. And, Petitioners' contention would not make good law. The purpose of a statute of limitations is to create finality and repose. That purpose would be thwarted if the statute of limitations did not begin to run until Petitioner finally decided to apply for a finding of wrongful incarceration preparatory to the receipt of compensation by the state.

Moreover, there is no need to await such a finding before allowing a §1983 cause of action to commence. The holding of *Heck* is founded on the principle that the court must avoid conflicting civil and criminal decisions. The statutory proceeding under R.C. 2305.02 and R.C. 2743.48

for compensatory damages for wrongful imprisonment is a civil action that the Petitioner Wilmoth was not required to file. If he wished to file a §1983 action in lieu of the state civil proceeding he could have done so under the holding in *Heck*.

The Court in *Heck* followed the analogy of the tort of malicious criminal prosecution, which merely requires an acquittal or a dismissal of charges for the cause of action to accrue. *Id.* at 237 and cases cited therein. There is no requirement under the malicious prosecution tort that it can only be pursued if the plaintiff has successfully won a wrongful imprisonment proceeding under a state civil statute. Likewise, §1983 has no such requirement.

The entry of the nolle prosequi was a final disposition of the criminal prosecution against Petitioner Wilmoth. Thus, the rationale of *Heck* does not preclude the court from finding that the date of entry of the nolle prosequi started the statute

of limitations running. See *Smith v. Holtz*, 87 F.3d at 114 (holding that *Heck* only requires dismissal of charges and not a finding of actual innocence before plaintiff may bring §1983 claim).

Even if the dismissal of the charges was a termination, Petitioners argue that it was not a favorable termination that would support a malicious prosecution claim. Petitioners contend that they were not alerted that they had a federal malicious prosecution claim until Wilmoth received a certificate of wrongful incarceration.

Courts generally hold that entry of a nolle prosequi without the procurement or consent of a defendant is a favorable termination of a criminal proceeding for purposes of a malicious prosecution claim. *See* 52 AM JUR. 3D Malicious Prosecution §35. A narrow exception to this rule exists when the dismissal of the charges does not indicate the defendant's innocence but is the result of the impossibility or

impracticability of bringing the defendant to trial. RESTATEMENT (SECOND) OF TORTS §661 (1977); *see also Donahue v. Gavin*, 280 F.3d 371, 384 (3d Cir. 2002) (concluding that plaintiff had no §1983 malicious prosecution claim when nolle prosequi was filed primarily because change in laws meant that upon retrial individual would not have received additional jail time); *Washington v. Summerville*, 127 F.3d 552, 558-59 (7th Cir. 1997) (holding plaintiff had no claim under §1983 for malicious prosecution when nolle prosequi gave no reason for dismissal and therefore was not a favorable termination). Here, the dismissal of the charges resulted from the complaining witness's refusal to testify. Neither the parties, nor the District Court, found any federal case law deciding whether this constitutes a favorable termination for purposes of a malicious prosecution claim. However, state courts addressing this issue have consistently concluded that a dismissal of charges based on the

complaining witness's refusal to testify is a favorable termination supporting a malicious prosecution claim. In *Cox v. Williams*, 593 N.W.2d 173, 175 (Mich. App. 1999), a Michigan appellate court concluded that a prosecutor's dismissal of criminal sexual conduct charges due to the complaining witness's refusal to testify was a favorable termination that could support a malicious prosecution claim. The *Cox* court observed that other state courts addressing the issue had similarly concluded. *Id.*

In *Loeb v. Teitelbaum*, 432 N.Y.S.2d 487, 493 (1980), *modified on other grounds*, 439 N.Y.S.2d 300 (1981), the New York Supreme Court Appellate Division found that dismissal of charges based on the prosecutor's failure to procure the testimony of two police officer witnesses implied a lack of reasonable grounds for prosecution. Thus, the court concluded that the action terminated in a favorable manner for malicious prosecution purposes.

Similarly, in an unpublished opinion, a California appellate court concluded that dismissal of a stepdaughter's childhood sexual abuse action against her former stepmother due to the stepdaughter's failure to appear at trial satisfied the favorable termination element of the stepmother's malicious prosecution claim. *Hermann v. Steinberg*, 2002 WL 31868109 *8 (Cal. App. Dec. 24, 2002).

The Restatement (Second) of Torts supports the reasoning of these state court cases. Section 659(c) states that criminal proceedings are terminated in favor of the accused by "the formal abandonment of the proceedings by the public prosecutor." RESTATEMENT (SECOND) OF TORTS §659(c)(1977). The establishment of actual innocence is not necessary to show a favorable termination for malicious prosecution purposes.

When the prosecution dismissed the charges against Petitioner Wilmoth, the proceedings had terminated in his

favor. At that time, all of the elements for a potential claim under §1983 existed. Therefore, the statute of limitations on Petitioners' cause of action accrued at that time.

Petitioners are asking this Court to provide a rule of law that is anathema to our legal system and our American sense of justice. Petitioners want this court to hold that a party must prove himself innocent before filing a lawsuit under §1983.

A party is presumed innocent in the absence of a conviction of guilt. When the court reversed Wilmoth's conviction and the prosecutor filed a nolle prosequi, Petitioner Wilmoth was in the "default" position of "presumed innocent" thereafter. It would be contrary to our jurisprudence to require him to do more in order to file a lawsuit under §1983. And it would be unnecessary to have such a requirement to uphold the policy set forth in *Heck*,

supra, that contrary state court and federal court decisions should be avoided.

The Court should be disinclined to accept Petitioners' hackneyed "floodgates to litigation" argument. Requiring an actual state court finding of innocence before permitting the filing of an action under §1983 will reduce the number of such actions. Keeping the law as it is, i.e., simply requiring the filing of a nolle prosequi, will result in the same number of potential §1983 lawsuits, not a "flood" of such cases. If a flood of such cases was waiting to break through, we would have expected a large number of reported and unreported cases with litigants in a similar situation as Petitioner Wilmoth. But, fortunately, there are few.

Petitioner Wilmoth's argument is illogical. A successful criminal defendant who was not incarcerated would have no state court, civil remedy for wrongful incarceration, i.e., no method to obtain a positive finding of

his proof of innocence. Presumably, for such a criminal defendant, a nolle prosequi would be sufficient to start the accrual of a §1983 claim.

However, according to Petitioner Wilmoth, a truly unfortunate criminal defendant who was wrongfully incarcerated cannot simply rely on a nolle prosequi to begin a §1983 action but must jump through an additional hoop. Why treat the two persons differently? There is no logical reason.

CONCLUSION

Based on the foregoing, this Court should affirm the holdings of the lower courts dismissing this case.

Respectfully submitted,
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